UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MILUM TEXTILE SERVICES CO.

and **Case Nos. 28-CA-20898**
28-CA-20906
UNITE HERE! **28-CA-20973**
28-CA-21050
28-CA-21203

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SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

Mary Miller Cracraft, Administrative Law Judge. This case is before me on remand from the Board, *Milum Textile Services Co.,* 357 NLRB No. 169 (2011),[1] for a determination of whether the Acting General Counsel sustained his burden of showing that a district court complaint filed by Milum Textile Services Co. (Respondent) against Charging Party UNITE HERE! (the Union) was baseless, and if so, whether it was retaliatory.

Having fully considered the General Counsel's and Respondent's briefs on these issues as well as the record as a whole, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. BACKGROUND

As more fully set forth in the Board's Decision, Respondent launders restaurant and healthcare linens at its commercial laundry facility in Phoenix, Arizona. The Union officially began an organizing campaign of Respondent's employees on March 3, 2006.[2] On March 10, the Union, through Milum Exposed, "An Independent website in the Public Interest by UNITE HERE," wrote identical letters to at least two of Respondent's customers warning of the risk of contaminated linens and urging those customers not to use Respondent's services. Further, a

[1] The underlying hearing was conducted by Administrative Law Judge Joseph Gontram on various dates in March and April 2007. Following Judge Gontram's death on July 18, 2007, prior to issuance of his decision in this case, the case was transferred to Administrative Law Judge Lana H. Parke, who issued her decision on October 5, 2007. Judge Parke has since retired.

[2] All dates are in 2006 unless otherwise referenced.

Union press release, UNITE HERE Media Alert, dated April 24, advised the public: SCOTTSDALE AND PHOENIX RESTAURANT CUSTOMERS BE AWARE: TABLE LINENS AND NAPKINS EXPOSED TO BLOOD AND BACTERIA AT LOCAL LAUNDRY."

On April 26, Respondent filed a complaint and motion for temporary restraining order (TRO) against the Union in the United States District Court, District of Arizona, in *Milum Textile Services Co. v. UNITE HERE,* Case 06-CV-1163. The motion for TRO was based solely on Section 303 of the Labor-Management Relations Act, 29 U.S.C. §303, which provides a cause of action for damages due to an illegal secondary boycott as defined in Section 8(b)(4) of the National Labor Relations Act (the Act), 29 U.S.C. §158(b)(4). On April 27, the District Court dismissed the motion for TRO. As the Board stated, (*Milum Textile Services,* 357 NLRB No. 169, slip op. at 2);

> The court denied the motion [for TRO]. It found that the expressive activity the Respondent sought to enjoin arose out of a labor dispute and therefore the Respondent would have to prove malice and actual damages in order to prevail on its claim. The court found that the Respondent had offered no proof of either of those essential elements of its claim. The court further found that the petitioned-for relief would constitute a highly disfavored prior restraint on speech.

Although the motion for TRO was dismissed, the district court complaint remained on the court's docket. This complaint alleged five causes of action: illegal secondary boycott, intentional interference with economic relationships, intentional interference with prospective economic advantage, libel, and common law fraud. On May 26, Respondent filed a Notice of Voluntary Case Dismissal of the district court complaint. According to the docket sheet, no other substantive actions took place in the district court complaint proceeding between April 27, the date of dismissal of the motion for TRO, and May 26, when Respondent moved for voluntary dismissal of the district court complaint.

The unfair labor practice complaint herein alleges that filing and maintenance of the district court complaint from April 26 through May 26 was unlawful as baseless and retaliatory in violation of Section 8(a)(1) of the Act. This issue was remanded due to the Board's clarification regarding the General Counsel's burden to prove baselessness as well as the Board's recent decision in *Allied Mechanical Services,* 357 NLRB No. 101 (2011), regarding retaliatory lawsuits.

B. ALLEGED BASELESSNESS OF LAWSUIT

In *BE&K Construction Co. v. NLRB,* 536 U.S. 516, 536-537 (2002), the Court held that the Board could not find every unsuccessful litigation baseless because the lawsuit had a retaliatory motive. Thus, the Board held on remand that a lawsuit lacks a reasonable basis or is "objectively baseless" if "no reasonable litigant could realistically expect success on the merits." *BE&K,* 351 NLRB 451, 457 (2007); see also *Ray Angelini, Inc.,* 351 NLRB 206, 208-209 (2007), quoting *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731, 747 (1983) ("if the plaintiff's position is plainly foreclosed as a matter of law or is otherwise frivolous, it lacks a reasonable basis.")

On remand herein, the Board held that at the district court complaint stage, the "baseless" prong of the analysis is: "whether a plaintiff, with the factual information in its possession and whatever additional factual information a reasonable potential litigant would have acquired prior to filing, could reasonably have believed it had a cause of action upon which relief could eventually be granted." *Milum Textile, supra,* slip op. at 6-7.

Further, the Board noted that the district court action was not a completed action but one maintained for a limited amount of time. Thus, the Board stated, *Id.* slip op. at 7*,*

> [T]he General Counsel had to prove that the Respondent, when it filed its complaint or during the time before it voluntarily dismissed the action, did not have and could not reasonably have believed it could acquire through discovery or other means evidence needed to prove essential elements of its causes of action.
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> The General Counsel must prove not simply that summary judgment would have been granted had the Union moved for it prior to the voluntary dismissal, but that Respondent would not have been able to present a colorable argument in opposition to the grant of summary judgment at that time.

Thus, the Board explicated, the judge must determine the elements of the causes of action and then evaluate the record evidence to determine whether General Counsel has proven that Respondent did not have and could not reasonably have believed it could acquire through discovery or other means, evidence needed to prove essential elements of its causes of action. *Id.*

On remand, the Board noted that in *Bill Johnson's, supra,* 461 U.S. at 746, fn. 11, the Court recommended that guidance be drawn from summary judgment and directed verdict jurisprudence. *Milum Textile,* slip op. at 7. Thus, when there is an absence of proof to support a nonmoving party's case, in a motion made prior to close of discovery, the nonmoving party may present via affidavit an explanation of why it cannot present evidence needed to support its claim at that time. *Id.* Further, the Board advised on remand:

> A judge must determine the elements of the causes of action that the General Counsel has placed at issue and then evaluate the evidence offered by the General Counsel to prove that the Respondent did not have, and could not reasonably have believed it could acquire through discovery or other means, evidence needed to prove essential elements of its causes of action, and consider also evidence offered by the Respondent to prove the contrary, including evidence in the nature of a statement under Fed. R. Civ. P. 56(d).

Id.

As relevant herein, Rule 56 provides as follows:

> **(a) Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court shall grant summary judgment when the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. . . . **(c) Procedures. (1) Supporting Factual Positions.** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: **(A)** citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, . . . admissions, interrogatory answers, or other materials; **(B)** showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the facts. . . . **(4) Affidavits or Declarations.** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set

> out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. **(d) When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: **(1)** defer considering the motion or deny it; **(2)** allow time to obtain affidavits or declarations or to take discovery; or **(3)** issue any other appropriate order.

As stated above, no party relied upon any evidence that could have been acquired through discovery or other means. No party offered any affidavit in support of an assertion that particular facts could or could not be genuinely disputed. The sole focus of the briefs on remand is with regard to the letters and the press release. In their briefs, the parties discuss only the Union's letters and press release as the sole basis for all counts of the district court complaint.[3] This is consistent with the evidence on the record as a whole. In other words, Respondent does not contend that it could have acquired through discovery or other means, any additional evidence needed to prove essential elements of its causes of action.

First Cause of Action: Section 303 Action for Damages due to Illegal Secondary Boycott

Elements of the Cause of Action for Damages for Illegal Secondary Boycott

In order to sustain an action for damages pursuant to Section 303,[4] a plaintiff must show that a labor organization or its agents threatened, coerced, or restrained any person with the object of forcing or requiring such person to cease doing business with any other person, i.e., a violation of Section 8(b)(4),[5] and that the plaintiff was injured in his business or property due to the union's illegal threat, coercion or restraint. See, e.g., *Mead's Market v. Retail Clerks Local 839,* 523 F.2d 1371, 1374 (9th Cir. 1975) (employer may sue for damages due to activity defined as an unfair labor practice in section 8(b)(4)); *Sheet Metal Workers Local 223 v. Atlas Sheet Metal Co.,* 384 F.2d 101, 108, 109 (5th Cir. 1967)(plaintiff must show that union violated section 8(b)(4) and employer sustained damages due to the 8(b)(4) activity).

In general, consumer handbilling, even though technically a "secondary" activity, is not prohibited by Section 8(b)(4)(B). In *Edward J. DeBartolo Corp. v. Building & Construction Trades Council (Florida Gulf Coast),* 485 U.S 568, 580 (1988) (*DeBartolo II*) the Court held that handbilling addressed to consumers or the public is not prohibited by Section 8(b)(4)(ii)(B) if it is not accompanied by picketing or coercive conduct.

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[3] Respondent's Brief on Remand at 18-19; General Counsel's Brief on Remand at 9-10.

[4] Section 303 of the Act, 29 U.S.C. Sec. 187, provides, (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the Act. (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States . . . without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

[5] Section 8(b)(4)(ii)(B), 29 U.S.C. Sec. 158(b)(4)(ii)(B), provides, inter alia,(b) It shall be an unfair labor practice for a labor organization or its agents (4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is – (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . .

The right of action under Section 303(b) is not dependent on a prior determination by the NLRB of violation of 8(b)(4)(B) or 10(l).[6] *Longshoremen v. Juneau Spruce Corp.*, 342 U.S. 237, 244 (1952). Although a finding of violation of Section 8(b)(4)(B) by the Board is usually given preclusive effect in a Section 303 action, see, e.g., *Paramount Transp. Sys. v. Teamsters Local 150,* 529 F.2d 1284, 1286 (9th Cir.), *cert. denied,* 426 U.S. 908 (1976), the refusal to issue complaint alleging a Section 8(b)(4)(B) violation is not given similar treatment. *W.R. Grace and Co. v. Local Union No. 759, International Union of United Rubber Workers of America,* 652 F.2d 1248, 1256 (5TH Cir. 1981), cert. granted on other ground, 458 U.S. 1105 (1982), affirmed, 461 U.S. 757 (1983). Thus, the fact that Respondent's unfair labor practice charge in Case 28-CC-1008, alleging a violation of Section 8(b)(4)(ii)(B), was dismissed by the Regional Director for Region 28 and that the dismissal was upheld by the NLRB Office of Appeals is not dispositive of the 8(b)(4)(B) issue addressed here.

Analysis

Based on the record as a whole, I find that the General Counsel has shown that Respondent did not have and could not reasonably have believed it could acquire through discovery or other means, evidence needed to prove an essential element of its Section 303 cause of action in that the record is devoid of any evidence of threat, coercion, or restraint, a necessary element for proving an illegal secondary boycott.

The Acting General Counsel's evidence included Respondent's district court complaint (GC Ex 8), in which Respondent averred that the Union, through "letters, fliers,[7] and a press release" containing knowingly false and misleading facts, commenced a "course of conduct" with the intent of damaging Respondent's reputation and causing Respondent's customers to cease doing business with Respondent. Respondent further averred that it suffered irreparable injury, loss of reputation and pecuniary damages as a direct and proximate result of the Union's acts.

The affidavit of Craig Milum in Support of Motion for TRO (GC Ex 11, paragraph 4) states that the press release (attached to the affidavit as Exhibit B) issued by the Union indicates that the Union would be "picketing" one of Respondent's customers on Thursday, April 27. However, the record contains no evidence of picketing as that term is commonly used, i.e., persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite,[8] and the press release referenced in the affidavit merely announces that a delegation from the Union, including its president, would speak, giving the date and location. Thus, I conclude based on the record as a whole that Respondent's district court complaint could not have relied on any picketing or other allegedly coercive conduct but relied solely on the letters

[6] Sec. 10(l) of the Act, 29 U.S.C. Sec. 160(l), provides exclusive jurisdiction for the NLRB to seek injunctions against unlawful secondary boycott activity. *Burlington Northern RR v. Brotherhood of Maintenance of Way Employees,* 481 U.S. 429, 448 (1987), cited by the Board on remand, *Milum,* slip op. at 8.

[7] The nature of "fliers" is not explicated further. Attachments to the district court complaint consisted of two letters to customers of Respondent and the press release.

[8] Further, in *Carpenters Local 1506 (Eliason & Knuth of Arizona,* 355 NLRB No. 159 (2010), slip op. at 7, the Board disavowed an earlier, broader definition of picketing in *Lumber & Sawmill Workers Local 2797 (Stolze Land & Lumber Co.),* 156 NLRB 388, 394 (1965*) (*"The important feature of picketing appears to be the posting by a labor organization . . . of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business" as flatly inconsistent with *DeBartolo II.*

and a press release. This finding is consistent with the briefs of the parties on remand, in that no party contends any activity beyond the letters and the press release.

I find that the Union's press release and letters truthfully advised the public of the nature of the primary dispute and the secondary employer's relationship to it. See, e.g., *DeBartolo II,* 485 U.S. at 575 (noting that handbills therein truthfully revealed the existence of a labor dispute and urged the public not to patronize the retailers in the mall). The letters and the press release stated that the restaurants utilized linens that Milum laundered, thus advising the public that the nature of the primary dispute was with conditions at Milum. The letters and the press release identified the secondary employers' relationships to Milum by announcing that these secondary employers utilized Milum to launder their linens. I conclude, based upon the above evidence as well as the record as a whole, that the General Counsel's evidence proves that the literature truthfully advised the public of the nature of the primary dispute and the secondary employers' relationships to it. Thus, a reasonable reading of both documents indicates without doubt that the primary dispute is with Respondent and not with Respondent's customers.

Respondent defends the baselessness allegation in its brief on remand arguing that the Union made statements in the press release and letters based solely on hearsay. Respondent avers that distribution of the press release and letters to secondary employers and customers elevates the inflammatory nature of the statements. Thus, Respondent claims that its district court complaint did not contain knowingly frivolous claims or intentional falsehoods. However, all of these arguments miss the point. Not one of these arguments relies on any evidence or basis for thinking that there was unlawful secondary activity, which is an essential element of a Section 303 action.

In its brief on remand, Respondent relies exclusively on the letters and the press release to meet the criteria for illegal secondary boycott. I am unaware of any evidence on which Respondent could rely to make the claim that it could have acquired through discovery or other means, further evidence of illegal secondary activity. Having fully considered the facts that Respondent set forth in its district court complaint and supporting documentation as well as the record as a whole, I find that the announced actions of the Union in connection with the press release as well as the letters constitute the lawful secondary activity of consumer handbilling as envisioned in *DeBartolo II.*[9] See also *Carpenters Local 1506 (Eliason & Knuth of Arizona),* 355 NLRB No. 159, slip op. at 6 (2010), citing *Mine Workers District 2 (Jeddo Coal Co.),* 334 NLRB 677, 686 (2001); *Service Employees Local 87 (Trinity Building Maintenance),* 312 NLRB 715, 743 (1993), enfd. 103 F3d 139 (9th Cir. 1996).

Simply stated, the General Counsel has proven that the Union was engaged in lawful handbilling. There is no evidence or tangible fact-based claim that Respondent could have acquired, through discovery or other means, evidence of illegal secondary boycott.[10] Under these circumstances, viewing the facts in a light most favorable to Respondent, as on a motion

[9] The secondary activity in *DeBartolo* involved revealing the existence of a labor dispute with a primary employer and urging potential customers of secondary employers, that is mall retailers, not to patronize the mall retailers because the mall ownership paid substandard wages.

[10] Although the General Counsel also argues that no damages have been proven and that, in fact, Respondent stated on several occasions that its business had not been damaged by the Union's actions, I find that this evidence, alone, does not constitute proof Respondent could not have proven damages or that Respondent did not have and could not reasonably have believed it could acquire through discovery or other means, evidence needed to prove damages. *Cf. Intercity Maintenance Co. v. Local 254, Service Employees International Union,* 241 F.3d 82, 89-90 (1st Cir.), cert. denied 534 U.S. 818 (2001).

for summary judgment, I find that the Acting General Counsel has shown that no genuine issue of material fact existed and that the Union was entitled to judgment as a matter of law. I further find that the Acting General Counsel has proven that Respondent could not reasonably have believed it could acquire through discovery or other means, evidence needed to prove essential elements of its Section 303 cause of action.

Thus, I conclude that the Acting General Counsel has proven that when Respondent filed its district court complaint and during the time before it voluntarily dismissed the action, Respondent did not have and could not reasonably have believed it could acquire through discovery or other means evidence needed to prove the element of threat, restraint or coercion, an essential element of its cause of action for damages due to illegal secondary boycott. Respondent's district court complaint cause of action for damages caused by an illegal secondary boycott was therefore baseless.

Second, Third, and Fourth Causes of Action: Intentional Interference with Economic Relations,[11] Intentional Interference with Prospective Economic Advantage,[12] and Libel[13]

Because these three causes of action are analyzed under the same standard, they will be discussed together. As the Board noted on remand, an action for tortious interference is subject to the partial preemption for actual malice articulated in *Linn v. Plant Guard Workers,* 383 U.S. 53 (1996). See *Beverly Hills Foodland, Inc. v. Food & Commercial Workers Local 655,* 39 F.3d 191, 196 (8th Cir. 1994) (applying *Linn* requirement of actual malice to tortious interference claim). *Milum Textile,* slip op. at 4. The Board explained that actual malice requires proof that statements were published with knowledge that they were false or with reckless disregard of whether they were false or not. *New York Times v. Sullivan,* 376 U.S. 254, 280 (1964). *Id.* Finally, the Board explained that ill will or ordinary malice should not be confused

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[11] Arizona follows the Restatement (Second) of Torts, Sec. 766 (1977) in determining the elements of intentional interference with contractual relations. A prima facie case of intentional interference with contractual (economic) relations is shown by proving (1) a valid contractual relationship, (2) knowledge of the contractual relationship, (3) intentional interference with the contract inducing or causing a breach, (4) damages resulting from the disruption and (5) improper interference. The interference must be intentional. Intent may be shown by proof that defendant intended or knew that "a particular result was substantially certain to be produced by its conduct." *Snow v. W. Sav. & Loan Ass'n,* 152 Ariz. 27, 34, 730 P.2d 204, 212 (1986) (en banc). To determine whether the defendant's interference was improper, the following facts are considered: (a) the nature of the actor's conduct; (b) the actor's motive; (c) the interest of the other with which the actor's conduct interferes; (d) the interest sought to be advanced by the actor; (e) the social interest in protecting the freedom of action of the actor and the contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to interference; and (g) the relations between the parties. *Id.* at 494 (quoting Restatement (Second) of Torts Sec. 767), giving the greatest weight to the first two factors.

[12] Arizona recognizes the tort of intentional interference with business expectancies (prospective economic advantage). *Edwards v. Anaconda Co.,* 115 Ariz. 313, 315, 565 P.2d 190, 193 (Ct. App. 1977); *Pre-Fit Door, Inc. v. Dor-Ways, Inc.,* 13 Ariz. App. 438, 440 (1970), following the Restatement of Torts Sec. 766, providing that "one who, without a privilege to do so, induces or otherwise purposely causes a third person not to . . . enter into or continue a business relations with another is liable to the other for the harm cause thereby." See, e.g., *Edwards v. Anaconda, supra,* 13 Ariz. App. at 315, 565 P.2d at 193.

[13] In Arizona, "[a] defamation action compensates damage to reputation or good name caused by the publication of false information." *Godbehere v. Phoenix Newspapers, Inc.,* 162 Ariz. 335, 341, 783 P.2d 781, 787 (Ariz. 1989). To prevail in an action for libel, a plaintiff must establish that the allegedly defamatory statement (1) was a false statement of actual fact, (2) was published, (3) and tended to harm the plaintiff's reputation.

with "actual malice" citing *Harte-Hanks Communications v. Connaughton,* 491 U.S. 657, 666 (1989) ("the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term.") *Id*.

Thus, even though tortious interference claims do not typically require proof of false claims or untruth as an element, in the labor context, when the libel and tortious interference claims are based on union statements and conduct occurring during a labor dispute, actual malice applies to these claims. As the court stated in *Beverly Hills Foodland, supra,* 39 F.3d at 196:

> We note the malice standard required for actionable defamation claims during labor disputes must equally be met for a tortious interference claim based on the same conduct or statements. This is only logical as a plaintiff may not avoid the protection afforded by the Constitution and federal labor law merely by the use of creative pleading. Here Foodland has alleged the distribution of the Union handbill tortiously interfered with its business relations with customers. Because the statements within the handbill are afforded protection under federal labor law, the conduct of distributing the handbills must be afforded the same protection. [footnote omitted].

In its district court complaint, Respondent alleged that the same actions underlying its claim for damages pursuant to Section 303 were also the basis for its claims of tortious interference. Thus the factual paragraphs of the district court complaint numbered 1-8 detail Respondent's claims for intentional interference (the second and third causes of action) by realleging by reference the facts which were alleged in the 303 action. Respondent's district court complaint thereafter alleged a contractual relationship with its customers and the Union's intentional interference with these relationships by seeking to cause Respondent's customers to cease doing business with Respondent.

Thus, it cannot be disputed that Respondent's claims for tortious interference arise out of the labor dispute between Respondent and the Union. This factual finding leads to the legal conclusion that Respondent's second and third causes of action are partially preempted by *Linn* and that Respondent was obligated to prove actual malice to prevail in the district court action.

The Board further noted on remand that when an allegedly defamatory statement arises from a labor dispute, an action for libel is also subject to the partial preemption articulated in *Linn v. Plant Guard Workers,* 383 U.S. 53, 61 (1996) for actual malice, that is plaintiff must establish that the statements were made with knowledge of their falsity or with reckless disregard for their truth or falsity. The district court complaint incorporates by reference the facts underlying its Section 303 action in the libel pleadings. Thus, in order to prove libel under the circumstances herein, a plaintiff must show that a false statement was published with knowledge that it was false or with reckless disregard of the truth or falsity of the matter. In discussing this standard and prior cases interpreting the standard, the Court stated in *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968),

> These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Analysis

Because the letters and the press release contain the statements at issue,[14] an examination of these documents for actual malice follows. A point by point comparison of the language of the letters with the Union's source for the statements in the letters, reveals that the Union closely adhered to the language in governmental reports or to employee reports of conditions.

- The letters caution of "risk of contamination" based upon employee reports of mixing restaurant linens with medical linens in the washers. Organizer Daisy Pitkin testified that workers told her that this statement was true. (Tr. 1693). For instance, the Union's study "Compromising on Quality" (GC Ex 6, Exhibit D, pages 1-4, sets out worker reports of failure to mark carts in the washing and drying department clearly for dirty laundry or clean laundry, worker reports of mixing clean and dirty linens in the linen pressing department, and failure to provide shoe covers for movement from the soil side to the clean side for soil sort workers.
- The letters advise, "Government investigations in 2002 found dirty and dangerous conditions -- that may produce linens that could be a risk to your business." Three sentences follow. Thus, this sentence must be judged based on the three sentences that follow.
- The first sentence states, "[Respondent] jeopardized the separation of soiled and clean linen by using the same bins for both. ADEQ. Notice of Violation." The evidence introduced by General Counsel reveals that in the context of an annual solid waste inspection, the Arizona Department of Environmental Quality (ADEQ) inspection report (GC Ex 139) dated September 16, 2002, commented, "Vehicles pick up dirty laundry and deliver clean laundry. Per Transportation Management Plan, 'Medical waste shall not be transported in a vehicle with clean linens.'" No violation was cited for this comment. However, a fair reading of the ADEQ comment supports the Union's statement that ADEQ found that a vehicle transporting medical waste was also used to transport clean linens and that this was contrary to the transportation management plan. Respondent notes that the inspection report deals with medical waste – not linens and that the document was admitted not for the truth of the matters asserted therein, but for the fact that

[14] In the factual summary of its brief on remand, Respondent notes that as a component of the corporate campaign against Milum, a March 2006 Union news letter entitled, "UNITE! Arizona Laundry Workers Organizing For Justice" asserted that Milum paid "poverty" wages. This evidence was offered in support of the libel claim in its district court complaint. (Tr. 1688; 2028-29; R Ex 14; Tr 2148-49, Rejected R Ex 30). Although Respondent's brief does not address the "poverty" wages issue in the legal analysis portion of its brief on remand, I find that the "poverty" wages statement is entitled to wide latitude as campaign propaganda. *Linn, supra,* 383 U.S. at 60, citing *Stewart-Warner Corp.,* 102 NLRB 1153, 1158 (1953). Moreover, there is no evidence that the Union knew the "poverty" characterization was false or that it made the "poverty" characterization with knowledge of the truth or falsity of the statement. Although Respondent asserts that the Union area contracts have lower wages for some job classifications, this can have no bearing on the "poverty" characterization, as campaign propaganda. *See also, Steam Press Holdings, Inc. v. Hawaii Teamsters and Allied Workers Union, Local 996,* 302 F.3d 998, 1006-1008 (9th Cir. 2002), cert. denied 537 U.S. 1232 (2003)(statement of union president that owner was "making money" and "hiding money" in holding company not defamatory but rather were rhetorical device setting forth opinion – not fact); *DHL Express, Inc.,* 355 NLRB No. 144, slip op. at 14 (2010) (containing a summary of the law regarding "hotly contested labor campaigns" containing statements of opinion or figurative expression not capable of being proved true or false).

the witness, Daisy Pitkin, relied on it. (Tr 1716). Neither of these arguments convinces me that the statement was made was knowledge that it was false or with reckless disregard for the truth or falsity of the statement.

- Further, the letters state, "[Respondent] did not train workers on quality control procedures. AZ OSHA" Union organizer Daisy Pitkin testified that she relied on statements of employees that they were not trained on quality control procedures. General Counsel produced a milumexposed document purportedly reporting the results of interviews with employees of Respondent which indicated that 75 percent of those surveyed reported never receiving health and safety training from Respondent.[15] There is no AZ OSHA report in the record. A US OSHA report in the record cites Respondent for blood borne pathogen violations. Respondent admits that one of these was for failure to train employees on protective equipment. (Respondent's Brief on remand, footnote 37). A 2002 ADEQ violation states that Respondent failed to maintain an emergency procedure for handling spills or accidents. (GC Ex 139, pp 11-12). Based upon this evidence, I find that the statement was not made with reckless disregard for the truth or falsity of the statement.
- The third sentence states, "[Respondent] has shown a disregard for Blood Borne Pathogenes (sic) Exposure Control Standards. AZ OHSA [sic]." At least one witness testified that she sorted linens contaminated with blood and containing needles and was not given gloves or a gown that fastened. In addition, General Counsel produced an undated milumexposed document (GC Ex 6, Exhibit "D") which cites a September 2002 OSHA finding of five serious violations of OSHA's blood borne pathogen regulations and providing a url citation containing general definitions and standards. Finally, General Counsel produced a 2002 US Department of Labor OSHA report showing an opening date of June 10, 2002, and a closing date of October 13, 2004, citing serious violations of the standard for "bloodborne pathogens." [16] Based upon these source materials, I find that this sentence was not made with reckless disregard for the truth or falsity of the statement. Rather, the sentence had a basis in fact.
- Finally, the letters conclude with a general statement not accusing Respondent of any malfeasance but stating, "Healthcare linens that are improperly cleaned may contain types of pathogenic bacteria, fungi and viruses. Milum Exposed is dedicated to informing the public of important issues in infection control.

A point by point review of the press release reveals the following comparison of press release statements and authorities upon which they are purportedly based.

- **SCOTTSDALE AND PHOENIX RESTAURANT CUSTOMERS BE AWARE: TABLE LINENS AND NAPKINS EXPOSED TO BLOOD AND BACTERIA AT LOCAL LAUNDRY.** In fact, the Union sponsored report, "Compromising on Quality: Conditions at Milum Textile Services Jeopardize Linen Quality" based on employee participation cites instances of employee reports of mixing dirty and clean items in the washing and

[15] Curiously, after publication of the letters, a May 4, 2006, Industrial Commission of Arizona, Division of Occupational Safety and Health (AZ OSHA) cited Respondent for failure to provide training to each employee required to use personal protective equipment and found failure to give effective employee training as required in the Lockout/Tagout Program set forth at 29 CFR 1910.147(c)(7)(i)(A) and (C).

[16] The May 4, 2006, AZ OSHA citation found "Soil sort area: The employer did not provide handwashing facilities readily accessible to employees with occupational exposure to bloodborne pathogens."

drying department where carts are not marked clearly for dirty laundry and clean laundry, in the linen pressing department where employees reported mixing clean and dirty items in the same bin, and by failure of laundry workers who move from the soil side to the clean side to be provided shoe covers.

- The press release continues with a factual statement that the Union will hand out copies of its "Compromising on Quality" and describes the above findings of the report concluding, "Employees report instances of mixing restaurant linens with medical linens contaminated with blood and feces. The study reveals that the restaurant customers cannot be assured of the quality of the linen used in these establishments." The study, "Compromising on Quality," cited as the source for these statements sets out employee reports as stated in the press release.
- The press release notes violations of basic standards for cleanliness in routinely failing to maintain a separation of clean and soiled linen (as mentioned above), failure to train workers on quality assurance or other job responsibilities (also based on "Compromising on Quality"), and violation of OSHA standards for blood borne pathogens. As with the letter, above, the General Counsel's evidence for the blood borne pathogen OSHA violation was produced in GC Ex 61.
- The press release then concludes with further information about events at the press release, setting out customers of Milum, and providing phone, email and internet sources for further information.

Thus I find that the statements in the press release, just as the statements in the letters, adhere closely to the findings of government agencies and the statements of employees. There are no facially obvious errors in the press release and the letters. The letters appropriately attribute statements to current employees. Thus, a fair reading of these statements is not that the stated conditions exist per se but that employees report that these conditions exist. Moreover, even if these statements were not attributed to the employees when the statements were published, the fact that employee statements were relied upon does not automatically require a finding of actual malice, as Respondent argues, unless the Union had a high degree of awareness of the probably falsity of such assertions. See, e.g., *Holbrook v. Harmon Automotive,* 58 F.3d 222, 226 (6th Cir. 1995) (actual malice not shown where record contained no evidence of any reason employer should doubt reports of three long-time, trusted management employees). There is no evidence on the record as a whole indicating that the Union entertained any doubts regarding the employees' assertions.

Similarly, the Union's literature relies on and paraphrases government findings noting that they were 4 years old at the time of the press release and letters. The letters accurately note the 2002 date of the government findings. Under these circumstances, reliance on 2002 governmental findings does not alone constitute evidence of actual malice in the circumstances herein. See, e.g., *Chicago District Council of Carpenters Pension Fund v. Reinke Insulation Co.,* 464 F.3d 651, 655 (7th Cir. 2006) (union's reliance on preliminary report based on incomplete records did not constitute evidence of actual malice).

Not only was there no colorable argument, based on the evidence available at the time the district court action was filed, that the Union was guilty of actual malice in publication of the letters and the press release but the evidence also reveals that Respondent could not have prevailed on a motion for summary judgment when the facts were considered in a light most favorable to it. Indeed, many of the statements are statements that the Respondent would be likely to know to be true. As to others, there is no basis to believe that Respondent could reasonably believe it could acquire evidence that supported the claim that these were untrue, much less that they were made by the Union with knowledge of their falsity or with reckless disregard for the truth or falsity. No party asserts that further evidence might reasonably have

been acquired regarding any of these three causes of action. Thus, I find that Acting General Counsel has proven that Respondent, when it filed its complaint or before the time it voluntarily dismissed the action, did not have and could not have believed it could acquire through discovery or other means, evidence needed to prove essential elements of its cause of action for intentional interference with economic relations, intentional interference with prospective economic advantage or libel.

Fifth Cause of Action: Fraud

Elements of the Cause of Action for Fraud

Under Arizona law, all nine elements of common law fraud must be proven to maintain the claim. *Nielson v. Flashberg,* 101 Ariz. 335, 338-339, 419 P.2d 514, 517-518 (Ariz. 1966). The elements of common law fraud are: (1) the defendant made a representation to the plaintiff, (2) the representation was false, (3) the representation was material, (4) the defendant knew the representation was false, (5) the defendant intended that the plaintiff would rely upon and act upon the representation reasonably contemplated by the defendant, (6) the plaintiff did not know that the representation was false, (7) the plaintiff relied on the truth of the representation, (8) the plaintiff's reliance was reasonable and justified under the circumstances and (9) as a result, the plaintiff was harmed. *Id.* at 338-339. See also, *Echols v. Beauty Built Homes, Inc.,* 132 Ariz. 498, 500, 647 P.2d 629, 631 (1982), cited by Respondent.

Analysis

In analyzing the first four causes of action in the district court complaint, it is abundantly clear that Respondent claims to know that the Union's representations were false. Yet a claim for fraud requires that an innocent, unknowing plaintiff rely on facts that the defendant sets out. Respondent is not such a plaintiff. Thus, the facts in this case do not lend themselves to any analysis of Respondent being harmed by its "reliance" on the Union's literature. Moreover, I have found in the preceding section that the Union did not know any of its assertions were false and the Union did not act with reckless disregard of the falsity of the assertions. Thus, I find that the Acting General Counsel has proven that Respondent could not have prevailed on a motion for summary judgment and that when it filed its complaint or before the time it voluntarily dismissed the action, it did not have and could not have acquired through discovery or other means, evidence needed to prove fraud.

As the Ninth Circuit Court of Appeals stated, albeit in a different context,

> Hence, we affirm the district court's conclusion that the Hotel failed to state the requisite predicate acts of mail and wire fraud. The Union did not *obtain* property by deceiving the Hotel or its customers; the Union was simply carrying on a strategy in a protracted labor dispute. The Union's conduct may have been vexatious or harassing, but it was not acquisitive. The purpose of the mail fraud and wire fraud proscriptions is to punish wrongful transfers of property from the victim to the wrongdoer, not to salve wounded feelings.

Monterey Plaza Hotel LP v. Local 483 of the Hotel Employees and Restaurant Employees Union, AFL-CIO, 215 F.3d 923, 926-927 (9th Cir. 2000). Similar policies obtain in this case. The Union's actions were not an attempt to defraud Respondent but were part of a labor dispute.

Respondent's Motion to Reopen the Record

In its brief on remand, Respondent states that it does not waive or abandon any arguments with regard to my refusal to reopen the record on remand. By motion of February 27, 2012, Respondent requested that the record be reopened in order to obtain evidence excluded by Judge Joseph Gontram in the underlying unfair labor practice hearing regarding "the truth or falsity of the union's statements, the existence of malice on the part of the union, and the damage suffered by Respondent as a result of the statements." Because Respondent's assertions are relevant to the Board's clear suggestion that Rule 56 procedures might be used on remand, I will treat the motion to reopen the record as a declaration pursuant to Rule 56(d) that Respondent claims it cannot produce facts essential to justify its position because Judge Gontram excluded the evidence.

Assuming Respondent's motion to reopen constitutes a declaration pursuant to Rule 56(d), it must nevertheless be denied because no admissible facts essential to justify its opposition are set forth in the motion. At the hearing before Judge Gontram, Respondent was allowed to question Union organizing director Daisy Pitkin about the basis for statements in the letters and the press release. Judge Gontram also noted that Respondent could recall Ms. Pitkin if further issues arose. Judge Gontram also allowed Respondent to introduce documentary evidence outside the four corners of the district court complaint. Although the judge rejected this evidence, the documents were preserved in the rejected exhibit file. Respondent did not specifically rely on the rejected evidence in its motion to reopen the record, but I have examined this rejected evidence and, with one exception discussed supra,[17] find that it is not relevant to any issue before me. See, in general, *Oak Harbor Freight Lines, Inc.,* 358 NLRB No. 41, slip op. fn. 2 (2012)(without regard to whether the judge erred in not admitting the proffered evidence, the result would not change even if the evidence had been admitted). As to the issue of malice or more appropriately, actual malice, this is a question of law reached, in this case, after examination of the statements and any supporting documentation. Finally, with respect to damages, evidence regarding damages, peculiarly within the knowledge of Respondent, was never offered by Respondent in the underlying unfair labor practice hearing even though the issue was raised in the complaint allegation regarding the allegedly baseless and retaliatory district court lawsuit. Reopening the record to allow introduction of such evidence would violate due process concepts by allowing Respondent a "second bite of the apple." Finally, no affidavit was offered on this issue even though the Board's remand clearly encouraged such procedure.

C. ALLEGED RETALIATORY MOTIVE

In *Allied Mechanical, Services,* 357 NLRB No. 101, slip op. at 10-11 (2011), the Board determined that retaliatory motive of a baseless lawsuit could be inferred from, among other things, "enduring and unlawful animus,"[18] from evidence indicating that the lawsuit was filed in

[17] See discussion of the libel cause of action and rejected R Ex 30, supra, fn. 14.

[18] The evidence of such animus included agreeing to recognize the union only in settlement of a *Gissel (NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969)) unfair labor practice complaint, failure to come to terms on a contract, instances of unlawful refusal to reinstate striking employees, overall bad faith bargaining including discharging striking employees, making unilateral changes, bypassing the union and refusal to furnish information, refusing to hire job applicants due to their union affiliation, withdrawal of recognition and other unilateral changes; a statement by the president of the company that he intended to "get even" with the union, and other unfair labor practices.

response to protected activity,[19] from evidence that the lawsuit was retaliatory on its face,[20] and from the lawsuit's obvious lack of merit.

For instance, in this very case the Board found retaliatory motive for filing the TRO was evidenced by the pleadings which the Board held were "retaliatory on its face" in seeking to enjoin the protected activity of peaceful distribution of handbills advertising a labor dispute to Respondent's customers and broadly seeking to restrain all communication with customers. *Milum Textile, supra,* slip op. at 5-6. Thus, the Board concluded, Respondent's TRO motion did not reflect "only a subjectively genuine desire to test the legality of the conduct"[21] that was targeted in the TRO. A second basis for determining that the TRO was retaliatory was that Respondent's other conduct, set out below, demonstrated animus against the Union. *Id.* slip op. at 6:

- retaliation against employees who attempted to publicize the labor dispute by discharging employee Denise Knox shortly after she appeared on a news program about the union campaign,
- unlawful discharge of employee Soe Moe Min,
- suspension of employee Evangelina Guzman because she refused to take off a Union button,
- granting a benefit of providing nametags in order to discourage employees from engaging in union activity,
- promulgating and maintaining a rule prohibiting employees from wearing Union buttons while working,
- creating the impression of surveillance by operating a security video camera in its lunchroom,
- impliedly threatening to reduce employee wages if they selected the Union as their bargaining representative, and
- interrogating employees during preparation for the hearing in the underlying unfair labor practice case.

Further animus was demonstrated when Respondent called the Union "cockroaches" and "monsters" and compared the Union campaign to an organized crime shakedown. Based on the over breadth of the remedy sought by the TRO as well as evidence of animus, the Board concluded that Respondent had a retaliatory motive in filing the TRO motion against the Union.

I find that the identical evidence of animus led to the filing of the district court complaint at the same time that the TRO was filed. Moreover, the timing of filing of the district court complaint reveals it was filed in response to protected activity. The district court complaint was filed 2 days after publication that the Union planned to distribute information to the public at a shopping center where two of Respondent's restaurant customers maintained their businesses. Finally, I find the lawsuit was retaliatory on its face. The district court complaint seeks to enjoin protected public handbilling and requests as a remedy that the Union be enjoined from "directly or indirectly sending or transmitting via any medium any unsolicited letters or documents to [Respondent's] customers, or verbally contacting or communicating with [Respondent's]

[19] The lawsuit claimed that the union had filed numerous unfair labor practice charges and engaged in lawful strikes.

[20] The lawsuit sought an award of money damages from the union based on the union's statutorily protected conduct of filing unfair labor practice charges, engaging in lawful strikes, and operating a job targeting program.

[21] *BE&K,* supra, 536 U.S. at 533-534.

customers or the customers of [Respondent's] customers. The Respondent requests special and general damages, costs, and attorneys' fees Thus, I find that Respondent's baseless lawsuit was filed for a retaliatory motive and violates Section 8(a)(1) of the Act.

CONCLUSION OF LAW

By filing and maintaining a baseless and retaliatory federal district court lawsuit against the Union, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

AMENDED REMEDY

The Board's Order in *Milum Textile, supra,* slip op. at 10, orders Respondent to cease and desist from filing preempted or baseless, retaliatory lawsuits.[22] That cease and desist language is broad enough to encompass the holding herein. I further recommend that the Order issued in *Milum*, slip op. at 10-11, be revised by adding the following phrase to paragraph 2(b) of the Order: "and its unlawful district court lawsuit for Section 303 damages, intentional interference with economic relations, intentional interference with prospective economic advantage, libel, and fraud" between the word "order," and before the word "with" to result in the following revised paragraph 2(b):

> Reimburse the Union for all legal and other expenses incurred in the defense of the Respondent's unlawful motion for a temporary restraining order and its unlawful district court lawsuit for Section 303 damages, intentional interference with economic relations, intentional interference with prospective economic advantage, libel, and fraud, with interest as described in the remedy section of this decision, as amended.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended order:[23]

ORDER

The Respondent, Milum Textile Services Co., Phoenix, Arizona, its officers, agents, successors, and assigns, have already been ordered to post at its facility, the Notice attached as the Appendix in *Milum Textile, Id.,* slip op. at 32-33. The Notice contains a paragraph that appropriately remedies the violation found herein; to wit: "WE WILL NOT file any lawsuit against the Union with the unlawful purpose of retaliating against the Union."

Dated, Washington, D.C., May 30, 2012.

Mary Miller Cracraft
Administrative Law Judge

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[22] In *Milum Textile, supra,* 357 NLRB, slip op. at 10, the Board ordered Respondent to "Cease and desist from (b) Instituting and pursuing any lawsuit against the Union that is preempted by federal law or that lacks a reasonable basis and is motivated by an intent to retaliate against activity protected by Section 7 of the Act."

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall be, as provided in Sec. 102.48 of the Board's Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.